

Exhibit 6

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.

Plaintiff

v.

TYSON FOODS, INC., et al.

Defendants

STATE OF ARKANSAS
ARKANSAS NATURAL RESOURCES
COMMISSION

Intervenors

Case No. 4:05-cv-00329-JOE-SAJ

BRIEF IN SUPPORT OF MOTION TO DISMISS

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The State of Arkansas, ex rel. Mike Beebe, Attorney General of the State of Arkansas, on behalf of Arkansas and as *parens patriae* on behalf of the citizens of Arkansas, and the Arkansas Natural Resources Commission (collectively “Arkansas”) submits this Brief in support of their Motion to Dismiss the claims filed by the State of Oklahoma and the Oklahoma Secretary of the Environment (“Oklahoma”) pursuant to Rule 12 (b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, as those claims attempt to affect activities occurring within the State of Arkansas.

INTRODUCTION

In 1970, Arkansas and Oklahoma entered into an interstate compact to address issues of water quality and apportionment in the Arkansas River Basin. This compact is administered by a Commission - comprised of three representatives from each State and, at times, a single non-voting federal representative appointed by the President. Over the years, the Commission has engaged in a number of activities aimed at addressing pollution levels - due to increased population and burgeoning local industries - in and around the Arkansas River and its watersheds.

This watershed, which is part of the Arkansas River Basin, covers 1,069,530-acres and is almost equally divided between Oklahoma and Arkansas. Arkansas and Oklahoma have entered into a Statement of Joint Principles and Actions aimed at developing measures to reduce pollution. Arkansas also has collaborated with the Commission to address these issues, which recently led to a substantial revision to portions of the Arkansas Code.

Despite the actions taken under the Compact and individually, Oklahoma apparently remains unsatisfied with the Commission’s and Arkansas’ attempts to address these water quality concerns from agricultural run-off. Rather than proceeding pursuant to the Compact, however, Oklahoma has taken unilateral action aimed at abating alleged pollution emanating from Arkansas. Accordingly, Oklahoma seeks to impose its own laws and regulations on economic activity and citizens located within Arkansas’ borders.

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Oklahoma manifests this extraterritorial application of its laws by seeking to enjoin certain lawful activity occurring within Arkansas and demanding compliance by Arkansas citizens with specific Oklahoma laws and regulations applied to activities conducted within the State of Arkansas. This action, and Oklahoma's more general view that it can subjugate Arkansas to Oklahoma's laws, violates a number of important principles that warrant the granting of Arkansas' motion to dismiss. First, Oklahoma violates the negative implications of the Commerce Clause by directly regulating economic activity that occurs wholly within Arkansas. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). Second, Oklahoma has breached the basic principle underlying the constitutional compact, *viz.*, each State entered the Union with its sovereignty intact, and the due process principle that the citizens of all States should not be subject to inconsistent laws and regulations. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

Third and most important, Oklahoma seeks to circumvent a process established by the Compact, which provides for the resolution of these issues through negotiation and collaboration. This process, which Oklahoma has discarded, was not only achieving real progress in addressing issues of water pollution, but also preserving the fundamental tenet that Oklahoma and Arkansas, as sovereign States, cannot be subjected to each others' laws.

Arkansas requests that this Court dismiss Oklahoma's claims as they are intended to affect lawful activities occurring within the State of Arkansas as violative of Arkansas' rights under the Constitution and the Compact with Oklahoma, and to compel Oklahoma to raise its grievances in the appropriate forum, the Compact's Commission.

THE ARKANSAS RIVER BASIN COMPACT

On March 16, 1970, Arkansas and Oklahoma negotiated an interstate compact - the Arkansas River Basin Compact ("the Compact") - to address issues of water quality and apportionment in the shared watersheds of the Arkansas River Basin. (attached as exhibit 1) *See*

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Ark. Code Ann. § 15-23-401 and Okla. Stat., tit. 82, § 1421.¹ A major purpose for both States' entry into the Compact was to "encourage the maintenance of an active pollution abatement program in each of the two States and to seek the further reduction of both natural and man-made pollution in the waters of the Arkansas River Basin." *Id.*, Art. I.D. To reach this objective, both States agreed to "facilitate the cooperation of [their] water administration agencies ... in the total development and management of the water resources of the Arkansas River Basin." *Id.*, Art. I.E.

The Compact, by its terms, also created an interstate administrative agency, the Arkansas-Oklahoma Arkansas River Compact Commission ("the Commission"), designated to oversee proper administration of the Compact. The Commission is comprised of three commissioners from each State. *Id.*, Art. VIII.B. & C. The Commission may also include a seventh commissioner - as its non-voting chair, *id.*, Art. VIII.A. - who represents the United States. *Id.*

The Compact vests within the Commission power to develop its own rules and regulations, *id.*, Art. IX.A.(5), and to "[h]old hearings and compel the attendance of witnesses for the purpose of taking testimony and receiving other appropriate and proper evidence and issuing such appropriate orders as it deems necessary for the proper administration of this Compact," *id.*, Art. IX.A.(7). Under the terms of the Compact, the Commission must additionally "[c]ollect, analyze and report on data as to stream flows, water quality, annual yields and such other information as is necessary for the proper administration of this Compact." *Id.*, Art. IX.B.(2).

THE PRESENT CONTROVERSY

Both Arkansas and Oklahoma, by entering into the Compact, committed to collaborate in their efforts to control and reduce pollution in the shared watersheds of the Arkansas River Basin. Specifically, they mutually agreed to: (1) abate man-made pollution within their respective borders and to continually support an active pollution abatement program, *id.*, Art. VII.A; (2) have their

¹ Revised on March 3, 1972, the Compact was subsequently ratified by Congress on November 13, 1973. Arkansas River Basin Compact, Pub. 2, No. 93-152, 87 Stat. 569 (1970).

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appropriate State agencies cooperate in investigating and abating sources of alleged interstate pollution within the Arkansas River Basin, *id.*, Art. VII.B.; and (3) enter into joint programs “for the identification and control of sources of pollution of the waters of the Arkansas River and its tributaries which are of interstate significance” *id.*, Art. VII.C. In addition, by entering into the Compact, both States recognized the authority given to the Commission to address interstate pollution control within the Arkansas River Basin. *Id.*, Art. IX.A.(7).

Over time, state monitoring programs have detected increases in phosphorus compounds, suspended sediments and bacteria within some segments of the Illinois River. *See* Joint Arkansas/Oklahoma Scenic River Monitoring Proposal 2 (2004) (attached as exhibit 2). Eventually, in 2003, as part of the collaborative process under the Compact, environmental officials from both States negotiated a “Statement of Joint Principles and Actions,” committing both States to coordinate monitoring the release of pollutants and to develop, by 2012, measures for substantially reducing phosphorus and achieving other water-quality goals. Statement of Joint Principles and Actions (2003) (attached as exhibit 3). This was consistent with the Commission’s exercise of pollution control responsibilities within the shared watershed as reflected in the minutes of the Annual Meetings of the Arkansas-Oklahoma Arkansas River Basin Compact Commission since 1981.

Agriculture is a primary stimulus of economic growth in Arkansas, making up nearly 11% of its gross state product. Jennie Popp et al., *Impact of the Agricultural Sector on the Arkansas Economy in 2001*, at 8 (Univ. of Ark. Sys. Research Report 975 (2005)) (attached as exhibit 4). The poultry industry alone contributes greatly to this output.² Arkansas recognized that the growth in agricultural activity in areas such as northwest Arkansas - where farmers and ranchers use commercial and natural fertilizers, including poultry litter - has the potential to create surplus nutrients that may enter the water through runoff from agricultural lands. *See* Keith Willett et al.,

² In 2001, the poultry industry provided 50,705 jobs in Arkansas, paid \$1.21 billion in wages, and created \$1.68 billion in value to the Arkansas economy. Popp et al., *supra*, at 18. (exhibit 4).

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The Opportunity Cost of Regulating Phosphorus From Boiler Production in the Illinois River Basin 26 (2005) (attached as exhibit 5). In 2003, the Arkansas General Assembly addressed the environmental effects of surplus nutrients by designating certain geographic areas within the Illinois River Watershed as “nutrient surplus areas” subject to nutrient-management plans designed to protect water quality. See Ark. Code Ann. §§ 15-20-901, *et seq.* (Arkansas Poultry Feeding Operations Registration Act); 15-20-1001, *et seq.* (Arkansas Soil Nutrient Management Planner and Applicator Certification Act); 15-20-1101, *et seq.* (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act); 15-20-1114 (governing potential conflicts between land application of poultry litter and Arkansas water and air pollution control laws). The Arkansas Natural Resources Commission subsequently adopted rules and regulations to implement the legislation. These regulations attempt to balance the State’s interest in protecting the watershed from the adverse effects of excess nutrients with competing interests in maximizing cost-effective soil fertility and plant growth. By September 2005, some 4,057 poultry growing operations were registered in Arkansas.³

Despite these collaborative efforts to regulate the utilization of nutrients in their shared watersheds, Oklahoma remained dissatisfied with Arkansas’ actions. Rather than proceed through the procedures established by the Commission, or engage in further bilateral negotiations, Oklahoma has instead resorted to unilateral action. Oklahoma now claims the right to apply its laws and regulations to commercial operations occurring wholly within the borders of Arkansas.

To that end, on August 19, 2005, Oklahoma brought a ten-count amended complaint against nine poultry companies - who contract with thousands of Arkansas poultry farmers - for violating, among other things, Oklahoma statutory and common laws by allegedly polluting the

³ The laws enacted by Arkansas in 2003 are similar to Oklahoma laws, which Oklahoma presumably considered to be a reasonable approach to dealing with nutrient loading originating from agriculture occurring within Oklahoma. See, *e.g.*, Okla. Stat., tit. 2, §§ 20-1, *et seq.* & 10-9.1, *et seq.*

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Illinois River Watershed (a designated sub-basin of the Arkansas River Basin, see Compact, Art. IV.B) with nutrients from the land-based application of poultry litter.

By the plain language of its complaint, Oklahoma obviously seeks to significantly alter agricultural practices throughout the Illinois River Watershed region, including those practices within the borders of Arkansas. See Compl. ¶¶ 1, 69, VI.3 (requesting a permanent injunction requiring defendants to “immediately abate” poultry fertilizer usage within the [Illinois River Watershed]). In so doing, Oklahoma seeks to regulate the land-application of poultry litter as a natural fertilizer and soil amendment under Oklahoma law, regardless on which side of the boundary line between the States it occurs. This is not inadvertent. In fact, Oklahoma’s Attorney General publicly has asserted that responsibility for nutrient pollution of the Illinois River Watershed lies “squarely on the shoulders of the Arkansas poultry industry.” W.A. Drew Edmundson, *Industry Blames 161 for Waste in Watershed*, Press Release (Oct. 4, 2005). (attached as exhibit 6).

The broader impact of this claim cannot be overlooked. Oklahoma seeks to impose extraterritorial obligations upon Arkansas and its citizens and to supplant Arkansas law. Allowing this imposition of Oklahoma law within Arkansas would undermine fundamental principles of State sovereignty. Under the constitutional compact among the People and the States, Arkansas retained unconstrained police powers - except as granted to the federal government or restricted by the Constitution - to determine what behavior may be proscribed as unlawful within its borders. Because Arkansas entered the Nation with its sovereignty intact, Oklahoma’s recourse for its grievance that Arkansas law fails to adequately abate pollution within shared watersheds was to seek redress under the Compact. What our constitutional plan categorically does not permit is for one State to subjugate a sister State, through the extraterritorial application of laws and regulations.

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Therefore, Arkansas, pursuant to Article I, section 10, clause 3 of the Constitution and 28 U.S.C. § 1251(a), moves for leave to file this original action against Oklahoma. Arkansas brings this suit to enjoin the extraterritorial application of Oklahoma law within Arkansas, thereby preventing the abrogation of Arkansas's laws and regulations relating to the same subject matter. Arkansas further seeks to enforce the Compact with Oklahoma, and to compel Oklahoma to address its pollution-based grievances through negotiation and collaboration before the Commission under the mechanism provided by the Compact. The fundamental sovereign interests of Arkansas to enact and enforce laws regulating conduct within its borders without interference by its neighbor presents a matter of vital importance that warrants this Court's granting of the Motion to Dismiss.

LEGAL ARGUMENT AND ANALYSIS

The Rules

The State of Arkansas moves for dismissal of Oklahoma's Complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. When a motion based upon both rules is filed with the Court, "the court should assess the Rule 12(b)(1) jurisdictional attack before determining whether the complaint fails to state a claim." *Taylor v. Dam*, 244 F.Supp.2d 747 (S.D. TX 2003).

As a general rule, Rule 12(b)(1) motions are considered either facial attacks or factual attacks. *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995). "Under a facial attack, the movant merely challenges the sufficiency of the complaint, requiring the district court to accept the allegations in the complaint as true. In a factual attack ...the movant goes beyond the allegations in the complaint and challenges the facts upon which subject matter jurisdiction depends. In such a situation, the court must look beyond the complaint and has wide discretion to allow documentary and even testimonial evidence under Rule 12(b)(1). [citations omitted]"

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Paper, Allied Industrial, Chemical and Energy Workers International Union et al. v. Continental Carbon Co. et al., 428 F. 3d 1285, 1292 (2005); see also *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987).

Arkansas' motion clearly constitutes a factual challenge to the Court's subject matter jurisdiction, akin to a challenge for failure to exhaust administrative remedies. For reasons set forth more fully below, the State of Arkansas asserts that Oklahoma has failed to properly address its claims to the Compact Commission pursuant to their legal obligations under the Compact. Oklahoma and Arkansas negotiated the Compact to address apportionment and water-quality concerns in the shared watersheds of the Arkansas River Basin. At issue is Oklahoma's decision *not* to raise its interstate pollution-related watershed grievances before the Commission, as specified in the Compact. Instead, Oklahoma seeks to unilaterally impose its laws and regulations on Arkansas, and to enforce these laws by bringing suit to enjoin economic activity that Arkansas has deemed lawful. A dismissal pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is warranted because by bringing this action, Oklahoma has rejected the administrative mechanism created by the Compact to facilitate a collaborative resolution of pollution-related concerns.

In addition, Oklahoma has stated claims in its Complaint for which no legal relief may be granted. Oklahoma's claims amount to an unlawful infringement on the sovereignty of the State of Arkansas, as well as violating the constitutional provisions relating to due process and interstate commerce. As demonstrated by its action filed herein, Oklahoma aims to directly regulate lawful commercial activity within Arkansas' borders as a solution to its alleged pollution problems. In so doing, Oklahoma has shown blatant disregard for Arkansas' own laws and regulatory regime, clearly violating basic principles of the Commerce Clause, which restrains State power over interstate economic activities. See *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). Along these lines, extraterritorial application of a State's laws is prohibited. See *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 393 (1994). In seeking to nullify Arkansas' laws and regulations,

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Oklahoma threatens Arkansas' sovereignty, thereby compromising Arkansas's status as a co-equal State - constitutionally guaranteed upon its entrance into the Union - and the due process protections guaranteed its citizens under the Fourteenth Amendment. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003).

Arkansas is only seeking a motion to dismiss as it relates to actions occurring in Arkansas that are lawful under Arkansas law. It is not seeking to litigate the specific liability claims raised by Oklahoma in this matter. Rather, Arkansas seeks only a dismissal as to the above referenced claims based upon Oklahoma's failure to exhaust their contractual remedies under the Compact and the fact that the Constitution limits Oklahoma's ability to impose its own laws and regulations regardless of state boundaries.

**The Compact is the Proper Mechanism for Regulating Interstate Water Pollution Issues
between Arkansas And Oklahoma**

Oklahoma's attempt to regulate persons and conduct solely within Arkansas, as a means to abate water pollution, violates its Compact with Arkansas. Unilateral application of Oklahoma law to the entire Illinois River Watershed circumvents the power of the Compact Commission - the administrative body charged with addressing this grievance through negotiation and collaboration. As a signatory to the Compact, Oklahoma is bound to bring its interstate pollution-related concerns to the Commission. Indeed, an Oklahoma agency charged with protecting water quality has previously concluded that "Arkansas and Oklahoma have essentially agreed through the Compact to pursue resolution of interstate pollution concerns through the Commission before resort to other available legal remedies." Pollution Remedies and Jurisdiction Considerations Under the Arkansas River Basin Compact, Op. Gen. Counsel, Oklahoma Water Resources Board, at 2 (Mar. 13, 1981) (attached as exhibit 7).

It is well-established that two States may not enter together into a compact without first receiving congressional consent. U.S. Const. art. I, § 10, cl. 3. When given, "congressional

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consent transforms an interstate compact ... into a law of the United States,” *Cuyler v. Adams*, 449 U.S. 433, 438 (1981), even though a compact still remains a contract “that must be construed and applied in accordance with its terms,” *Texas v. New Mexico*, 182 U.S. 124, 128 (1987) (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)). A result of this transformation is that “unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.” *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). By imposing its policy choices concerning water pollution in the entire Illinois River Watershed, Oklahoma violates the explicit terms of the Compact.

By its plain language, a major purpose of the Compact is to “encourage the maintenance of an active pollution abatement program in each of the two States and to seek the further reduction of both natural and man-made pollution in the waters of the Arkansas River Basin.” Compact, Art. I.D. Thus, the Compact includes provisions stipulating the collaborative effort needed by both States in order to identify and abate pollution within their shared watersheds. Specifically, both States have mutually agreed (1) that their appropriate State agencies will take steps toward abatement of interstate pollution within their jurisdictions, *id.*, Art. VII.B, and (2) to enter into joint programs to identify and control sources of significant interstate pollution in the Arkansas River Basin, *id.*, Art. VII.C. In addition, by their entry into the Compact, both Arkansas and Oklahoma have recognized the authority of the Commission - the interstate agency created by the Compact “for the proper administration of this Compact” - to address interstate water pollution issues in the Arkansas River Basin. *Id.*, Art. IX.A.(7).

These pollution abatement provisions are vital to the proper implementation of the Compact. See *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Nor has the Commission, in its administration of

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the agreement, treated these terms as anything but vital to the interests of the party States. In fact, the Commission has long recognized that its responsibilities under the Compact include “jurisdiction over pollution from one state to another.” Minutes from the annual meeting of the Arkansas-Oklahoma Arkansas River Compact Commission 7 (Oct. 1, 1981) (attached as exhibit 8). The Commission has substantiated its role in curbing interstate pollution within the shared watersheds by approving rules and regulations aimed at abating pollution within the Arkansas River Basin. *See* Minutes from annual meeting of the Arkansas-Oklahoma Arkansas River Compact Commission 5-6 (Sept. 27, 1984) (attached as exhibit 9) (creating a forum for the “identification and discussion of pollution” and the “cooperat[ion]” between the States in “maint[aining] ... active pollution abatement programs); *see also* Minutes from the annual meeting of the Arkansas-Oklahoma Arkansas River Basin Compact Commission 76 (Sept. 25, 1986) (attached as exhibit 10) (noting an ongoing study regarding waste discharge and pollution problems in the Illinois River). Moreover, Oklahoma’s water quality officials have acknowledged that “[u]nquestionably, the pursuit of interstate water pollution remedies through the Arkansas River Basin Compact and the Compact Commission is proper, appropriate, and contemplated under the Compact and applicable law.” Pollution Remedies and Jurisdictional Considerations under the Arkansas River Basin Compact, Op. Gen. Counsel, Oklahoma Water Resources Board, at 2 (Mar. 13, 1981). In fact, Oklahoma has conceded that any interstate water pollution suit should be dismissed in favor of proceedings before the Compact Commission. *See id.* at 2.

Over the last decade, water quality in the Illinois River has been a focal point of Commission meetings. *See* Minutes from the annual meeting of the Arkansas-Oklahoma Arkansas River Basin Compact Commission 151 (Dec. 5, 1995) (attached as exhibit 11) (noting one commissioner’s “desire to see both states’ agencies begin thinking of dealing with poultry producers/companies in terms of creative solutions” when it comes to runoff); Minutes from the annual meeting of the Arkansas-Oklahoma Arkansas River Basin Compact Commission 144 (Oct. 3, 1996) (attached as exhibit 12) (reporting on a joint committee meeting in which setting

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phosphorus reduction goals was discussed, as well as the positive impacts the Commission has made and will continue to make by working to develop and implement water quality standards). In 1997, the Commission adopted a phosphorus reduction goal of 40% for the Illinois River. Minutes from the annual meeting of the Arkansas-Oklahoma Arkansas River Basin Compact Commission 148, 154 (Sept. 24, 1998) (attached as exhibit 13). In recent years, the Commission's Environmental and Natural Resources Committee has reported at the annual Commission meetings both the progress and set-backs it has encountered in working to achieve these goals. *See* Minutes from the annual meeting of the Arkansas-Oklahoma Arkansas River Basin Compact Commission 158-59 (Sept. 29, 1999) (attached as exhibit 14); Minutes from the annual meeting of the Arkansas-Oklahoma Arkansas River Basin Compact Commission 4-6 (Oct. 17, 2001) (attached as exhibit 15) (noting potentially flawed methodology and the need for implementing new phosphorus monitoring plans)

These collaborative efforts have led to tangible results. Prior to the filing of Oklahoma's recent lawsuit, both Oklahoma and Arkansas recognized that issues of interstate water quality must be handled on a cooperative basis through the auspices of the Compact Commission. *See, e.g.,* Oklahoma Commissioners' Report, Arkansas-Oklahoma Arkansas River Compact Commission 2-3 (Sep. 24, 2003) (attached as exhibit 16) (discussing, among other water quality issues, negotiations between Arkansas and Oklahoma officials to establish a numerical water quality standard for phosphorous). In particular, the Commission and both Arkansas and Oklahoma acknowledged that issues associated with surplus nutrients in the Illinois River Watershed were subject to collaboration and study through the Compact Commission, rather than court litigation. *See, e.g., id.*; Pollution Remedies and Jurisdictional Considerations, at 1-2. As noted above, the Commission has investigated the complex facts surrounding these issues and has made recommendations to reduce the amount of nutrients in interstate water bodies. Before the recent lawsuit, Oklahoma recognized that this collaborative effort was producing legislative and regulatory responses from both Arkansas and Oklahoma. *See* Joint Arkansas/Oklahoma Scenic

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River Monitoring Proposal 2 (2004) (outlining some of the regulatory successes associated with the Compact's collaborative process). In particular, Arkansas' General Assembly responded by declaring certain watershed areas "nutrient surplus areas" and enacting nutrient-management legislation designed for their improvement. *See* Ark. Code Ann §§ 15-20-901 *et seq.*; 15-20-1001 *et seq.*; 15-20-1101 *et seq.* In other words, the process established by the Compact as a replacement for interstate litigation over water quality is working.

In stark contrast, Oklahoma has now cast this well-established collaborative process aside and chosen to attempt directly to impose its policy choices upon Arkansas. Rather than collaborate and negotiate a resolution before the Commission, which Oklahoma agreed to do when it entered into the Compact, Oklahoma has deliberately evaded the Compact by unilaterally imposing its own State pollution abatement regulations on Arkansas. This evasion "'strikes right at the heart' of the two-state Arkansas River Compact Commission." Robert J. Smith, *Member: Suit Waters Role of 2-State Panel*, Ark. Democratic Gazette, Sep. 23, 2005, NW Ark Sec. (quoting Michael Carter, Commissioner from Arkansas) (attached as exhibit 17). Oklahoma has thereby deprived the Commission of one of its core responsibilities in its "administration of this Compact" - controlling interstate pollution. Compact, Art. IX.A.(7); *see also* Smith, *supra*, ("The [Commission] is well on its way to becoming an academic body ... If we're not irrelevant now, we will become irrelevant.") (quoting Commissioner Michael Carter).

Accordingly, Oklahoma's displacement of Arkansas' regulatory scheme constitutes a material breach of the Compact. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States.").

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Nonetheless, Oklahoma may argue that this Court does have jurisdiction to hear their claims prior to said claims being fully exhausted before the Compact Commission. Such an argument is misplaced.

The Compact does refer to the possibility of a suit in federal court in certain circumstances, Compact, Art. XIII.B. But such suits are limited to circumstances where there is an allegation by one signatory that another signatory has violated the Compact. The Compact nowhere authorizes an end run around the agreed upon Commission process and procedures and nowhere sanctions a lawsuit such as the one filed by Oklahoma. A district court's jurisdiction, therefore, under the federal legislation that codified the Compact, is limited to an *enforcement* action under the Compact - circumstances where one signatory State to an interstate compact sues another signatory for violation of the requirements of the compact, which is not the case here. This exceedingly narrow grant of concurrent jurisdiction to district courts is confirmed by the Senate Committee Report:⁴

The purpose of the proposed legislation is to give the U.S. district courts concurrent original jurisdiction of cases involving the pollution of interstate river systems *where the pollution is an alleged violation of an interstate compact* and the signatory States have consented to such jurisdiction in their compact.

S. Rep. No. 87-2211 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3282, 3282 (emphasis supplied); see also *id.* at 3282-83 (noting that "all of the ... conditions" must be met for the district court to have original jurisdiction, including the condition that there be "pollution of the waters ... in alleged violation of the compact").

Thus, the mention of federal court enforcement is inapplicable where Oklahoma seeks to use litigation to evade the terms of the Compact, not to enforce them. Arkansas' motion to dismiss is premised upon Oklahoma's failure to raise this dispute before the Commission, which provides a mutually agreed upon, collaborative forum for both sovereigns to address the multi-jurisdictional

⁴ To our knowledge, no federal court has interpreted section 466g-1 in a published decision.

issue of pollution in the Illinois River Watershed. Accordingly, section 466g-1 is inapplicable, and this case should be dismissed for failure to exhaust the remedies provided by the Compact.

**Imposition of Oklahoma Law In Arkansas Constitutes The Direct Regulation Of
Interstate Commerce**

It is well-established that a State law that has the “practical effect” of regulating commerce in other States violates the Commerce Clause. *See Brown-Forman Distillers Corp. v. New York State Liquor Author.*, 476 U.S. 573, 579 (1986) (holding that state action runs afoul of the Commerce Clause when it “directly regulates ... interstate commerce”). In other words, “[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Healy*, 491 U.S. at 336 (1989).

The significance of Oklahoma’s decision to regulate Arkansas industry cannot be understated. Its impermissibility is demonstrated by the relief Oklahoma seeks - a declaration that commercial activity, lawfully occurring *in Arkansas*, violates Oklahoma law. This is behavior that only Arkansas, or Congress, has the authority to regulate. For that reason, the Courts have long interpreted the Commerce Clause, although silent in its text, as operating as an affirmative restraint on State power over interstate commerce. *See Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923) (“By the Constitution (article 1, § 8, cl. 3) the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states.”), *aff’d on reh’g*, 263 U.S. 350 (1923). By so construing the Commerce Clause, this Court has protected interstate commerce from conflicting obligations imposed by potentially overlapping, inconsistent State laws.

It is no answer to say that Oklahoma’s Complaint can be read as seeking only to enforce certain of its statutes and its common law within Arkansas, while arguably seeking to restrict the application of other statutes to activities occurring only in Oklahoma. Compare Okla. Compl. ¶¶ 98-108 (seeking to impose Oklahoma’s statutory and common law of nuisance and statutory

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damage provisions in Arkansas), and ¶¶ 119-127 (seeking to impose Oklahoma common law of trespass and statutory damage provisions in Arkansas), and ¶¶ 128-132 (seeking to impose Oklahoma environmental statutes within Arkansas), with ¶¶ 134-35, 138-139 (seeking relief under Oklahoma's statutory and regulatory schemes governing waste discharges and Animal Waste Management Plans for conduct occurring in Oklahoma). Oklahoma's attempt at extraterritorial application of its law does not pass constitutional muster merely because Oklahoma may have so far refrained from attempting to project every one of its laws into Arkansas. Moreover, if Oklahoma were permitted to enforce any of its laws governing the use of poultry litter within Arkansas, that would impose additional, and plainly inconsistent, obligations upon commerce occurring wholly within Arkansas. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (the Commerce Clause forbids state actions that “create an impermissible risk of inconsistent regulation by different states”). Through its construction of its own laws, Oklahoma claims the right to regulate, as unlawful, activity that Arkansas has deemed lawful. Oklahoma has alleged that the use of poultry litter as a natural fertilizer and soil amendment within Arkansas violates Oklahoma's statutory and regulatory schemes governing waste discharges see Okla. Compl. ¶¶ 128-132 (App. A), *even though* the people of Arkansas, acting through their duly elected legislature and expert regulatory agencies, have imposed their own comprehensive regulatory regime. While Oklahoma possesses the power to exercise its judgment regarding activity that occurs within its territorial borders, Oklahoma has no authority to impose that judgment upon Arkansas. See *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 393 (1994) (a State may not selectively target interstate commerce it deems harmful because “[t]o do so would extend the [State's] police power beyond its jurisdictional bound”); *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (“The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, “any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of State power.”). Absent intervention by the Court, Oklahoma's decision to

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regulate outside its borders creates the acute risk that a single State will impose *at least* regional, and possibly national, standards on significant interstate economic activity.

Oklahoma's attempt to sanction Arkansans for purported violations of Oklahoma law, premised upon activity occurring wholly within Arkansas, would logically lead to the conclusion that those engaged in otherwise lawful commercial activity in Arkansas must alter their commercial practices to avoid violating Oklahoma law. If, as Oklahoma asserts, several sections of Oklahoma's statutes govern agricultural activities in Arkansas, there would be no reason that the remainder of Oklahoma's statutes would not also apply. Indeed, the absence of intervention by the Court *invites* further enforcement actions by Oklahoma for economic activity occurring in its sister States, thereby providing incentive for Oklahoma to impose the negative burdens of commerce upon the industries and economic activity occurring *outside*, rather than inside, Oklahoma. *Cf. Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339-40 (1992) ("No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade."). Further, Oklahoma's regulatory decision sets the stage for retaliatory actions by the affected States. To that end, the United States Supreme Court, in reviewing similar cases, has considered not only the "consequences" of the acts but also how that act "may intersect with the legitimate regulatory regimes of the other States and what effect would rise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 335; *see also Wyoming*, 502 U.S. at 453-54 (1992); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (the Commerce Clause closes "the door ... to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation").

Moreover, the Commerce Clause prohibits extraterritorial application of a State statute regardless of "whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. It would be nonsensical for the Court to permit

States to shield their regulations from judicial review merely by shifting the discriminatory components of the law from the statutory text to the discretionary enforcement mechanisms of its State officers. Thus, irrespective of whether the policy choice was adopted by the Oklahoma legislature or Oklahoma's officers, Oklahoma's laws as construed and enforced would have the "practical effect" of regulating commerce in Arkansas.

The Extraterritorial Application Of Oklahoma Law Infringes Upon The Sovereignty Of Arkansas

In addition to the Commerce Clause, inherent in our system of government are certain federalism-maintaining limitations on the power of States to project their laws beyond their borders. "This is so obviously the necessary result of the Constitution that it has rarely been called into question...." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). The Supreme Court has articulated two constitutional norms violated by the extraterritorial application of State law. First, such application violates "[a] basic principle of federalism," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003), and "principles of state sovereignty and comity," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996), by displacing the decisions of a co-equal State. Second, it violates the due process rights of citizens by punishing them for activities that are perfectly lawful where they occur. See, e.g., *Gore*, 517 U.S. at 573 (States lack the power to punish persons "for conduct that was lawful where it occurred"). Oklahoma's enforcement action violates both these norms.

Federalism

The application of Oklahoma law within Arkansas eviscerates the principle that each State entered our Nation with its "sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. at 779. Upon entry into our federal system, the constitutional compact guaranteed that each State remain a sovereign entity. See *id.*; *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) ("[T]he attributes of sovereignty [are] enjoyed by the government of every State in the Union."). The Constitution,

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therefore, is offended when a State seeks to “legislate” outside of “its own jurisdiction.” *Bonaparte v. Appeal Tax Court*, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction . . . Each State is independent of all the others in this particular.”).

Indeed, the Constitution contains numerous provisions whose purpose is to maintain the distinct and co-equal status of the States. See, *e.g.*, U.S. Const. art IV, § 1 (“Full Faith and Credit shall be given by each State to the public Acts . . . of every other State.”), art. IV, § 2, cl. 2 (“A Person charged in any State . . . who shall flee from Justice, and be found in another State, shall on Demand of the . . . State from which he fled, be delivered up...”). Consistent with these textual provisions, for over a century the cases have emphasized the importance of “the constitutional barriers by which all States are restricted within the orbits of their lawful authority and upon which the preservation of the Government under the Constitution depends.” *New York Life*, 234 U.S. at 161.

Hence, the Supreme Court has declared unconstitutional actions that violate the “basic principle of federalism that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.” *State Farm*, 538 U.S. at 422. This norm recognizes the basic structural reality that in a republic of co-equal States, one State cannot have a legitimate interest in regulating the activity of citizens in another State. See, *e.g.*, *id.* at 421 (“Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”); *Gore*, 517 U.S. at 572 (“We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.”).

Oklahoma’s decision to impose its laws within Arkansas is an affront to this norm because it treads upon Arkansas’s prerogative to legislate within its own borders. As previously noted,

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Arkansas has created its own comprehensive system of laws and regulations to govern the use of poultry litter as fertilizer. See, e.g., Ark. Code Ann. §§ 15-20-901, *et seq.*; §§ 15-20-1101, *et seq.* By enforcing Oklahoma law within Arkansas, Oklahoma displaces this regime and governs the poultry industry within Arkansas's borders according to Oklahoma standards. But Arkansas, as a sovereign State, is entitled to make its own policy choices regarding the agricultural practices within its borders; Oklahoma's attempt to impose its own preferences upon Arkansas violates the fundamental principle that a State "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states." *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934).

Due Process

Oklahoma's extraterritorial application of its law deprives thousands of Arkansas citizens of due process in violation of the Fourteenth Amendment. Acting as *parens patriae*, Arkansas asserts these rights on behalf of its citizens.⁵ The Supreme Court has declared on numerous occasions "the due process principle that a state is without power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954). See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the state which enacts them...."). By seeking to punish behavior occurring exclusively within Arkansas and

⁵ Under the *parens patriae* doctrine, a State has standing to press the claims of its citizens when those claims implicate the State's quasi-sovereign interests. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-02 (1982). A quasi-sovereign interest is one that stands apart from the interests of merely private parties, and implicates the State's general concern for "the health and well-being—both physical and economic—of its residents in general." *Id.* at 607.

Oklahoma's decision to regulate Arkansas will punish thousands of Arkansas poultry farmers by forcing them to comply with burdensome injunctions imposed on the named defendants with which they contract, as well as bearing the economic impact of the fines and money damages that Oklahoma seeks to levy against them. See *id.* at 609 (finding standing where only 787 people were immediately effected). Arkansas has an interest in the economic impact of Oklahoma's due process violations on Arkansas citizens not named in Oklahoma's lawsuit. See *Pennsylvania*, 262 U.S. at 591-92 (economic interest of citizens is "a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected").

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which is completely lawful under Arkansas law, Oklahoma exceeds its legitimate power. Thus, Arkansas has an inherent interest in protecting the constitutional rights of its citizenry against such overreaching by a sister State, as well as in vindicating Arkansas's own dignity and sovereignty before the Court.

In a number of contexts, the Supreme Court has forcefully reaffirmed that citizens cannot be punished by the laws of another State for conduct that is legal in the State where it occurs. In *BMW of North America, Inc. v. Gore*, the Court held that a punitive damages award based in part on lawful conduct in other States violated the due process rights of the defendant, because “to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” 517 U.S. at 573 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)); see also *State Farm*, 538 U.S. at 421 (“A State cannot punish a defendant for conduct that may have been lawful where it occurred.”). These decisions follow from a long line of cases where the Court has held that laws imposing legal obligations on other jurisdictions violate due process. See, e.g., *New York Life*, 234 U.S. at 162 (“[A] State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of taxing power.”); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407 (1930) (“The Texas statute as here construed [to invalidate insurance contracts that were legal in Mexico where they were executed] deprives the garnishees of property without due process of law.”); *Virginia v. Bigelow*, 421 U.S. 809, 824 (1975) (“Virginia possessed no authority to regulate the services provided in New York”).

Oklahoma, by enforcing its laws within Arkansas, explicitly seeks to punish Arkansas citizens under Oklahoma law for activities that are lawful in Arkansas. See Okla. Compl. ¶¶ 98-108, 128-132, 140-147. In fact, Oklahoma's attempt to regulate a large area of Arkansas threatens to unconstitutionally punish significant numbers of unnamed Arkansas citizens - farmers who will

be plainly affected by the litigation and the obligations it will impose.⁶ Accordingly, Arkansas requests that its Motion to Dismiss be granted in order to protect the interests of its citizens, who are engaged in lawful activity, within the borders of their own state.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion to Dismiss Oklahoma's claims filed by Arkansas and the Arkansas Natural Resources Commission as those claims apply to lawful activities occurring within the State of Arkansas.

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⁶ There can be no doubt that Oklahoma's lawsuit seeks to "punish" Arkansas citizens given the repeated requests by Oklahoma for the assessments of "penalties" against the defendants and an express prayer for "exemplary and punitive damages." See Okla. Compl. ¶¶ 126, 132, 139 and prayer ¶¶ 5 & 6.